85-865

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES PURDY LAMBERT ..... Petitioner

versus

UNITED STATES OF AMERICA ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Where a private employee of defendant had an F.B.I. informant number, had been a paid informer for the F.B.I. on two (2) previous occasions, had been paid more than Two Thousand Dollars ($2,000.00) for her services in this case, had supplied information to the F.B.I. on at least twenty-five (25) occasions concerning this case, had removed items of personal property from defendant's home to give to the F.B.I. on five (5) to ten (10) occasions and had constantly been directed by the F.B.I. as to what she could or could not do to assist them, should she be regarded as an agent of the F.B.I. for purposes of the Fourth Amendment to the Constitution of the United States of America?

2. Whether Rule 10 (e) of the Federal Rules of Appellate Procedure permits a United States Court of Appeals to supplement the appellate record after oral argument with evidence not presented to the trial court?

2A. Whether, in the absence of a sealing and custody order, the requirements of Title 18, Section 2518 (8) (a) were met in this case and, if they were not met, whether the evidence on the tapes should have been suppressed?

3. Whether the flagrant disregard for the limitations of the search warrant in this case requires the suppression of all evidence seized during the search?

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NO.

JAMES PURDY LAMBERT..... *Petitioner*

V.

UNITED STATES OF AMERICA..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

The Petitioner respectfully prays that a Writ of Certiorari be issued to review the Judgement of the United States Court of Appeals for the Sixth Circuit entered on August 16, 1985, affirming the Petitioner's conviction for violation of Title 21, United States Code, Section 846.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit affirming the Petitioner's conviction was entered on August 16, 1985, and is reported at 771 F. 2d 83 (6th Cir. 1985), and appears in the Appendix to this Petition. The Trial Court entered a Memorandum Opinion and Order on May 25, 1984, and a Memorandum Opinion and Order on June 6, 1984, both of which appear in the Appendix to this Petition and neither of which has been officially reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered and filed on August 16, 1985. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by the Petitioner on August 27, 1985, and said Petition was denied by Order of the Court of Appeals entered and filed on September 27, 1985.

This Petition for Writ of Certiorari was served and filed within sixty (60) days of September 27, 1985. This Court's jurisdiction is invoked under the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

Constitutional Provision:

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutory Provision:

Title 18, United States Code, Section 2518(8) (a) provides:

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing

such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

Rule Provision:

Rule 10(e) of the Federal Rules of Appellate Procedure provides:

> Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

STATEMENT OF THE CASE

The Petitioner, James Purdy Lambert, was originally indicted in a multi-count indictment by the Grand Jury for the United States District Court for the Eastern District of Kentucky on January 19, 1984, and after the trial court expressed reservations about the sufficiency of certain allegations in the indictment, a superseding multi-count indictment, containing basically the same counts, was returned by the Grand Jury or April 17, 1984. Count 1 of the indictment charged Mr. Lambert with conspiracy to distribute controlled substances in violation of Title 21, United States Code, Section 846. The trial court had jurisdiction of the charges by virtue of Title 18, United States Code, Section 3231.

The Petitioner filed pre-trial motions asking, *inter alia*, for the suppression of evidence and the fruits thereof: (a) seized by a employee of the petitioner, (b) obtained by electronic surveillance, and (c) seized during searches pursuant to search warrents. After evidentiary hearings, the trial court granted Mr. Lambert's motion to suppress most of the documents seized during the searches, denied his motion as to other evidence seized during those searches, denied his motion as to the evidence obtained by electronic surveillance, and denied his motion with regard to evidence seized by Mr. Lambert's employee. These findings by the trial court are contained in two (2) Memorandum Opinion and Orders entered May 25, 1984, and June 6, 1984, and which are contained in the Appendix to this Petition.

On June 7, 1984, pursuant to an agreement under Rule 11(a)(2) of the Federal Rules of Criminal Procedure with the United States and approved by the trial court, Mr. Lambert entered a conditional plea of quilty to Count 1 of the indictment, and the other counts were dismissed. Pursuant to that agreement, Mr. Lambert received the right to appeal those portions of his motions to suppress that were denied by the

trial court. On July 17, 1984, Mr. Lambert was sentenced to five (5) years imprisonment on said Count 1.

An appeal was taken to the United States Court of Appeals for the Sixth Circuit, which resulted in the conviction being affirmed, and with the decision of the Court of Appeals being contained in the Appendix to this Petition.

At the evidentiary hearings before the trial court, the evidence was undisputed that Mr. Lambert's part-time housekeeper, Diana Hall, had an F.B.I. informant number, had been a paid informer for the F.B.I. in two previous cases, had been paid more than Two Thousand Dollars (2,000.00) for her services in this case, and had supplied information concerning this case to the F.B.I. on at least twenty-five (25) occasions over a period of several months. It further appeared that she had removed items of personal property from Mr. Lambert's home on five (5) to ten (10) occasions and given those items to the F.B.I., and that she had been instructed by the F.B.I. as to what she could or could not do to assist them in the investigation.

A number of the items removed by Ms. Hall were from Mr. Lambert's trash and they are not in issue herein. Other items included a check stub and telephone bills referencing a payment to then Kentucky Governor John Y. Brown, Jr. and calls to his telephone. These items were ultimately shown on a local television station after being given to the F.B.I. They do not relate to the charge in question, as such, but they do illustrate some degree of control over Ms. Hall by the F.B.I.

On one occasion, Ms. Hall testified that several persons whom she believed to be involved with drugs were in Mr. Lambert's basement. A co-defendant, Philip Block, was living in the basement at that time. Ms. Hall concluded that cocaine was being cut because of odors she could smell upstairs. After everyone had left, Ms. Hall went to the basement and found, in a closet, a thermos containing a white powder, a portion of which she took to the F.B.I. and which was subsequently determined by them to be cocaine. This portion from the

thermos then formed the cornerstone for the affidavits to permit the electronic surveillance and to obtain the search warrants.

For a period of some ninety (90) days, the F.B.I. maintained electronic surveillance of Mr. Lambert's home, including his bedroom, under authority of title 18, United States Code, Section 2510, *et seq.*, and obtained recordings of a number of conversations, particularly from the bedroom, indicating the personal use of cocaine.

There were a number of issues raised with regard to the legality of the electronic surveillance, which were determined by the trial court and appealed to the Court of Appeals. One of these was whether there had been proper provision for the sealing and custody of the recordings after they were returned to the judge that authorized the electronic surveillance.

No sealing and/or custody order was ever introduced into evidence at the trial court level. The purported custodian of these tapes, Joann Moxley, testified before the trial court as follows:

Q. Do you have Court Order from Judge Moynahan designating you as custodian of these records?
A. No, I do not.
Q. Who designated you as custodian of these records, Mrs. Moxley?
A. My employer.
Q. Which would be the Federal Bureau of Investigation designated you?
A. Yes.

With the record standing such, this issue was fully briefed by both sides before the United States Court of Appeals for the Sixth Circuit, with the Petitioner herein relying on *United States v. Abraham*, 541 F. 2d 624 (6th Cir. 1976) and *United States v. Gigante*, 538 F. 2d 502 (2nd Cir. 1976). The government then, before oral argument, filed a motion to sup-

plement the record with an attached affidavit from an F.B.I. agent stating that he believed that such an order existed and that it was under seal. Mr. Lambert responded by objecting to the motion and citing *Unites States v. Page*, 661 F. 2d 1080 (5th Cir. 1981), *cert. denied*, 455 U.S. 1018, 72 L. Ed.2d 136, 102 S. Ct. 1713 (1982) for the proposition that Rule 10(e) of the Federal Rules of Appellate Procedure was available only to correct the record to reflect what in fact occurred before the trial court, and that it was not available to supply new evidence.

After oral arguments, the panel for the Court of Appeals directed that the purported custody and sealing order be forwarded to it for its consideration, and at footnote 1, page 88, of its opinion approved this procedure. It then further held that such order sufficiently provided for the sealing and custody of the tapes. To this date, counsel for Mr. Lambert has not seen nor been given a copy of this order, even though such was requested in Mr. Lambert's response to the government's motion.

As a part of Mr. Lambert's motion to suppress the evidence obtained pursuant to the search warrants, an issue arose as to whether the F.B.I. had flagrantly disregarded the limitations of the warrants as to the items to be seized. After hearing the evidence, Judge Reed, the trial court judge, found:

> However, the Court finds that the complaints of defendant are well taken regarding the volume of irrelevant documents and other material seized. The warrant authorized the seizure only of documents relating to the sale and distribution of controlled substances. Nevertheless, the government agents proceeded to seize such clearly irrelevant documents as the third grade report card of defendant's son, an invoice for an oil change, an invitation to an Elmhurst Farm luncheon, a fund-raising letter for the Albert B. Chandler Medical Center, 1975 offer to purchase defendant's house, and other papers which were clearly outside the scope of the search warrant. The F.B.I.

then took these materials, along with a large quanity of defendant's business and financial records, to their headquarters in Louisville, where they have been held for the past year. The fact that the prosecution has announced its intention to introduce only five of the documents at trial evidences the *unreasonableness* of the search. Although this behavior was *unreasonable* and is *strongly condemned* by the Court, it does not appear to provide justification for suppressing those materials which were validly seized under the authorization of the search warrant. For this reason, the motion of defendant to suppress *all* evidence seized in the search must be denied. However, those documents which do not prove to relate to the distribution and sale of controlled substances will be suppressed, if necessary, at trial. [Emphasis added]. [A complete inventory of the documents seized is included in the Appendix to this Petition.]

The panel for the Court of Appeals, 717 F.2d 83, at page 93 of its opinion, through recognizing that a flagrant disregard for the limitations of a search warrant might make an otherwise valid search an impermissible general search, appears to have overruled Judge Reed's factual findings of the unreasonableness of the search. It appears to have based its opinion on an uncross-examined affidavit about a "drug sniffing" dog. Judge Reed made no findings as to the truth, or lack of it, contained in this affidavit.

ARGUMENT

1. A private employee should be regarded as an agent of the F.B.I. for purposes of the Fourth Amendment to the Constitution of the United States' prohibition against unreasonable searches and seizures, where she had an F.B.I. informant number, had been a paid informer for the F.B.I. on two previous occasions, had been paid more than Two Thousand Dollars ($2,000.00) for her services in this case, had supplied information to the F.B.I. on at least twenty-five (25) occasions concerning this case, had removed items of personal property from defendant's home to give to the F.B.I. on five (5) to ten (10) occasions and had constantly been directed by the F.B.I. as to what she could or could not do to assist them.

The Court of Appeals, 771 F.2d 83, at p. 89 of its opinion, held that:

> . . . . While it is clear that Diana Hall acted with the requisite agent intent, the record fails to show that the F.B.I. instigated, encouraged or participated in her searches.

In so holding, the Court of Appeals relied on *United States v. Coleman*, 628 F.2d 961 (6th Cir. 1980) and *United States v. Howard*, 752 F.2d 220 (6th Cir. 1985) (U.S. App. Pndg.).

To the extend *Coleman*, *supra*, and *Howard*, *supra*, so hold and certainly to the extent the case at bar holds that the government must have *actively* participated in a particular search and seizure in order for the private person to be regarded as the agent of the government, the case at bar and *Coleman* and *Howard* squarely conflict with *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981).

In *Walther*, *supra*, the Ninth Circuit held, at page 793:

> We are also satisfied that Rivard's prior experience with the DEA provides proof of the government's acquiescence in the search. While the DEA had no prior knowledge that this particular search would be conducted and had not directly encouraged Rivard to search this overnight case, it had certainly encouraged Rivard to engage in this type of search. Rivard had been rewarded for providing drug-related information in the past. He had opened Speed Paks before, and did so with no discouragement from the DEA. The DEA thus had knowledge of a particular pattern of search activity dealing with a specific category of cargo, and had acquiesced in such activity.
> [Footnote omitted]

This conflict between the Sixth Circuit and the Ninth Circuit meets the requirements of Rule 17.1(a) of the Rules of the

Supreme Court and this Petition for Writ of Certiorari should be granted to resolve the conflict.

In addition, this case involves an important question of federal law which has not been settled by this Court. This case will give this court the opportunity to spell out what federal investigatory agencies can and cannot do with paid informants in search and seizure cases. Counsel submits that this case meets the requirements of Rule 17.1(c) of the Rules of the Supreme Court, and this Petition for Writ of Certiorari should be granted to decide this important question of federal law.

2. Rule 10(e) of the Federal Rules of Appellate Procedure does not permit a United States Court of Appeals to supplement the appellate record after oral argument with evidence not presented to the trial court.

2A. In the absence of a sealing and custody order, the requirements of Title 18, Section 2518(8) (a) were not met in this case and the evidence on the tapes should have been suppressed.

At footnote 1 of its opinion,The Court of Appeals, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, granted the government's motion to supplement the record with a sealing and custody order that was not put into evidence before the trial court when it held an evidentiary hearing on Mr. Lambert's motion to suppress evidence obtained from electronic surveillance. By granting this motion, Mr. Lambert's issues regarding proper provision for the sealing and custody of the tapes pursuant to Title 18, United States Code, Section 2518 (8) (a) were effectively eliminated.

This supplementation appears to squarely conflict with the decision of the Fifth Circuit in *United States v. Page*, 661 F.2d 1080 (5th Cir. 1981), *cert. denied*, 455 U.S. 1018, 72 L.Ed.2d 136, 102 S.Ct. 1713 (1982), wherein the Court, at page 1082, held:

. . . . The distinction to be made is tolerably fine one,

> but real: *What in fact went on* below may be settled and placed of record pursuant to Rule 10(e) and whatever proceedings are necessary to that end are permissible. New proceedings of a substantive nature, designed to supply what might have been done but was not, are beyond the reach of the rule . . . . [Emphasis in original]

Thus, this issue meets the requirements of Rule 17.1(a) of the Rules of the Supreme Court. It likewise involves an important question of federal procedural law, since the holding in the case at bar will invite numerous attempts by both the government and defendants in the future "to supply what might have been done but was not."

In the event this Petition for Writ of Certiorari is granted, then this subissue could be remanded to the Court of Appeals to determine if on the record, and in the absence of a sealing and custody order, the requirements of Title 18, Section 2518 (8) (a) were met or not. Then, if they were not met, whether the evidence on the tapes should have been suppressed.

The requirements of Rule 17.1(c) of the Rules of the Supreme Court are, therefore, met and this Petition for Writ of Certiorari should be granted.

3. The flagrant disregard for the limitations of the search warrant in this case requires the suppression of all evidence seized during the searches.

The Court of Appeals in the case at bar recognized the general principle that a *flagrant disregard* for the limitations of a search warrant can make an otherwise valid search an impermissible general search requiring the suppression of all evidence seized during the search. *See, also, Marvin v. United States*, 732 F.2d 669 (8th Cir. 1984) and *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971 (1982). The Court of Appeals further noted "absent flagrant action, however, the items covered by the warrant will be admissible." *See, Waller v. Georgia*, _____ U.S. _____, 104 S.Ct. 2210, 2214 n.3 (1984).

The trial court, Judge Reed, after an evidentiary hearing, had made findings that the seizure of all of the documents was *unreasonable*, but he declined to suppress the remaining five (5) documents the government intended to introduce at trial. The Court of Appeals appears to have overruled Judge Reed's findings on the basis of a "drug-sniffing" dog affidavit that found its way into the trial court record, but evidently was not considered by Judge Reed, since he made absolutely no mention of it in his May 25, 1984 Memorandum Opinion and Order, which is contained in the Appendix to this Petition, along with the court-supervised Inventory of Documents.

Earlier, in the Court of Appeals opinion, 771 F.2d 83, at p. 89, it had correctly stated the principle that:

> The district court's evidentiary rulings must be upheld on appeal unless they are clearly erroneous. *United States v. Coleman*, 628 F.2d 961, 963 (6th Cir. 1980). In reviewing the court's rulings under this standard, our inquiry is limited to determining whether the rulings are supported by substantial evidence.

If, for purposes of argument, one assumes that the Court of Appeals was bound by Judge Reed's ruling that the seizure of all of these documents was *unreasonable*, then one should next determine if there is any substantial difference between the meanings of the words *flagrant disregard* and *unreasonable*.

Black's Law Dictionary defines "unreasonable" as "Irrational; foolish; unwise; absurd; silly; preposterous; senseless; stupid . . . . Not reasonable; immoderate; exorbitant . . . . Capricious; arbitrary; confiscatory." [Citations omitted]. *Webster's* defines "flagrant" as "conspicuously bad or objectionable." While the words do not mean exactly the same thing, they are very close and they embrace similar concepts.

If anything, Judge Reed's word "unreasonable" may be a more appropriate word, since it is the word used by the *Fourth Amendment* to the *Constitution of the United States*. Counsel submits that in the context used, Judge Reed's use of "unreason-

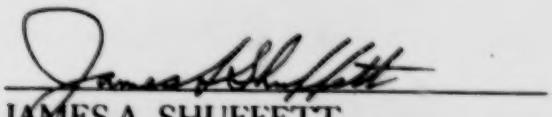
able" at least encompassed the principles of "flagrant disregard."

The foregoing issue in the case at bar will permit this Court to reconcile and define these terms for the purpose of clarifying the standard to be used in determining the extent to which the scope of a search warrant must be exceeded so as to constitute an impermissible general search within the meaning of the Fourth Amendment. Accordingly, counsel submits that it meets the requirements of Rule 17.1(c) of the Rules of the Supreme Court.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit affirming the Petitioner's conviction.

Respectfully submitted,



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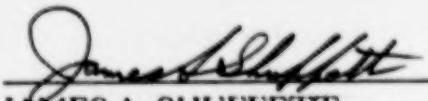
CERTIFICATE OF SERVICE AND ENTRY OF APPEARANCE

James A. Shuffett hereby certifies that this Petition for Writ of Certiorari has been served upon the United States of America by mailing three (3) copies of same, first-class postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 18th day of November, 1985. Rules of the Supreme Court 28.3, 28.4(a), 28.5, 28.5(b), 19.3. All parties required to be served have been served.

James A. Shuffett hereby enters an appearance on behalf of the Petitioner, James Purdy Lambert. Rules of the Supreme Court 28.5(b), 19.3.



JAMES A. SHUFFETT
Member of the Bar of the
Supreme Court of the
United States

APPENDIX

Nos. 84-5660, 84-5661

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, - - *Plaintiff-Appellee,*

v.

James Purdy Lambert, and
Philip M. Block, - - - - *Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Argued June 5, 1985 Decided August 16, 1985

Defendants were convicted before the United States District Court for the Eastern District of Kentucky, Scott Reed, J., of conspiracy and distribution of controlled substances and they appealed. The Court of Appeals, Weick, Senior Circuit Judge, held that: (1) defendant's housekeeper was not acting as an agent of the Government in removing inculpatory evidence from defendant's residence, and thus such seizures did not fall within Fourth Amendment; (2) FBI and United States attorney complied with statutory requirements for application and issuance of wiretaps; (3) affidavit in support of search warrant contained ample factual allegations to establish probable cause; and (4) even if FBI agents did exceed scope of warrant when they seized certain items because FBI dogs trained to sniff for drugs indicated that drug residues were contained on items, it was not error for court to admit evidence which was clearly within warrant's scope.

Affirmed.

I Page 83-84

1. Criminal Law 1158(4)

District court's evidentiary rulings must be upheld on appeal unless they are clearly erroneous; in reviewing court's rulings under the standard, inquiry of Court of Appeals is limited to determining whether rulings are supported by substantial evidence.

2. Searches and Seizures 7(4)

Fourth Amendment proscribes only governmental action and does not apply to a search or seizure, even an unreasonable one, conducted by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official. U.S.C.A. Const. Amend. 4.

3. Searches and Seizures 7(4)

In determining whether search conducted by private individual is state action for Fourth Amendment purposes because individual was acting as an agent for the government, a person will not be found to be acting as a police agent merely because there was some antecedent contact between that person and the police; rather, two facts must be shown: police must have instigated, encouraged or participated in the search, and individual must have engaged in the search with the intent of assisting the police in their investigative effort. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures 7(4)

Housekeeper's searches of defendant's home during which she seized items and brought them to the FBI were private searches not within purview of Fourth Amendment, where FBI never instructed or encouraged housekeeper to take items from defendant's home, but instead told her on several occasions she should not take such items from the house. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures 7(4) Page 84

There is no "seizure" within meaning of the Fourth Amendment when an object discovered in a private search is voluntarily relinquished to the government. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

6. Telecommunications 512

Section of Omnibus Crime Control and Safe Streets Act [18 U.S.C.A. 2516] providing that a wiretap application must be authorized by the attorney general or by specially designated assistant Attorney General does not require designation of a specific individual to authorize wiretaps; rather, it is permissible for the Attorney General to designate a person by the office he or she holds, and such designation will then apply to whomever holds such office in the future.

7. Telecommunications 512

Where assistant attorney general authorized actual wiretap application, his signature was not necessary to authorize subsequent application seeking court's permission to change parties involved in installing the wiretaps. 18 U.S.C.A. 2516(1).

8. Telecommunications 516

Provisions of Omnibus Crime Control and Safe Streets Act [18 U.S.C.A. 2518(1)(c), (3)(c)] requiring that application for wiretap order include statement as to whether investigative procedures have been tried and that court grant order if it determines that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed or to be too dangerous do not require that police officials exhaust every conceivable nonwiretap investigative technique; all that is required is that investigators give serious consideration to nonwiretap techniques prior to applying for wiretap authority and that the court be informed of reasons for the investigators'

belief that such nonwiretap techniques have been or will likely be inadequate.

9. Telecommunications 516

Where affidavits in support of wiretap application explained in great detail that other investigative techniques could not reasonably be used because of defendant's extreme and correct suspicion that his activities were being monitored and fact that alternative investigating procedures, such as directly questioning defendant and his associates, would likely alert subjects to presence and scope of investigation, affidavits satisfied Government's obligation under 18 U.S.C.A. 2518(1)(c) requiring that application for wiretap order include statement as to whether other investigative procedures have been tried or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

10. Telecommunications 516

Where court, in its order authorizing wiretaps, took specific notice of wiretap affidavit's explanation that other investigative measures could not reasonably be used, such was sufficient to satisfy court's duty under 18 U.S.C.A. 2518(3)(c) requiring that court determine that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

11. Telecommunications 514

Wiretap application complied with requirement of 18 U.S.C.A. 2518(1)(b)(ii) that application include a particular description of location of place where communication is to be intercepted by identifying location of defendant's house, notwithstanding claim that Government was required to disclose to court fact that it intended to place a listening device in defendant's bedroom.

12. Telecommunications 518 Page 85

18 U.S.C.A. 2518(1)(b)(ii) providing that a wiretap application include particular description of location of place where communication is to be intercepted does not require judge to approve precise location in a house where each listening device will be placed; such is best left to discretion of law enforcement officials.

13. Telecommunications 515

Wiretap applications which contained an overwhelming amount of evidence detailing extent of drug activities at defendant's house were more than sufficient to satisfy 18 U.S.C.A. 2516 permitting use of wiretap to uncover evidence of any offense involving narcotics or any conspiracy to commit narcotics offenses.

14. Searches and Seizures 3.6(2)

In determining whether an affidavit in support of a search warrant establishes probable cause, court must evaluate affidavit under "totality of the circumstances" standard.

15. Searches and Seizures 3.6(2)

Notwithstanding deference which must be accorded to magistrate's determination, if information contained in a search warrant affidavit does not add up to probable cause, warrant will be held invalid.

16. Drugs and Narcotics 188

Where affidavit in support of search warrant detailed housekeeper's eyewitness account of defendant's extensive use of illegal drugs at his home and his meetings with persons who appeared to be drug dealers, and recounted wiretap evidence indicating that defendant was using and purchasing cocaine and was likely involved in drug dealing, magistrate had substantial basis for probable cause finding and search warrant was properly issued.

17. Drugs and Narcotics 189 Page 85-86

FBI did not go outside scope of warrant authorizing it to search for illegal drugs, equipment used to manufacture drugs, drug paraphernalia and all documents relating to sale and distribution of drugs, when it seized items which were not, on their face, specific types of items authorized to be seized by the warrant because they contained drug residue, as determined by FBI dogs, as it was impractical for FBI to remove such microscopic residue without taking the items themselves.

18. Criminal Law 394.4(8)
Searches and Seizures 3.8(1)

Unlawful seizure of items outside a search warrant does not alone render whole search invalid and require suppression of all evidence seized, including that lawfully taken pursuant to the warrant.

19. Criminal Law 394.4(8)
Searches and Seizures 3.8(1)

A flagrant disregard for limitations of a search warrant may make an otherwise valid search an impermissible general search requiring suppression of all evidence seized during the search; however, absent flagrant action, items covered by warrant will be admissible.

20. Criminal Law 394.4(8)

Even if FBI agents did exceed scope of search warrant authorizing search for illegal drugs, equipment used to manufacture drugs, drug paraphernalia, and all documents relating to sale and distribution of drugs, by seizing items which were not, on their face, specific types of items authorized because they contained drug residue, it was not error for court to admit evidence which was clearly within the warrant's scope.

James A Shuffett (argued), Lexington, Ky., Michael D. Baker, Frank E. Haddad, Jr., Louisville, Ky. for defendant-appellant in No. 84-5660.

Louis DeFalaise, U.S. Atty., Lexington, Ky., Robert Trevey, Jane Graham (argued), for plaintiff-appellee.

Albert T.Quick, David Friedman, American Civil Liberties Union of Ky., Louisville, Ky., for amicus curiae in No. 84-5660.

Donald D. Waggener (argued), Lexington, Ky., (Court appointed), for defendant-appellant in No. 84-5661.

Before KENNEDY and WELLFORD, Circuit Judges, and WEICK, Senior Circuit Judge.

WEICK, Senior Circuit Judge.

Defendants-Appellants James Lambert and Phillip Block entered conditional pleas of guilty in the District Court, pursuant to Federal Rules of Criminal Procedure, Rule 11(a)(2), to single counts of their respective indictments charging conspiracy and distribution of controlled substances in violation of 21 U.S.C. 846. In their conditional pleas, the defendants reserved the right to appeal from the District Court's denial of their pretrial motions to suppress evidence obtained by the government through electronic wiretapping, the execution of a search warrant and the actions of an FBI informant. Each defendant was sentenced to five years imprisonment. Defendant Block, in his appeal, also challenged the court's ruling that he lacked standing to object to the admission of this evidence. For the reasons hereinafter stated, we conclude that the District Court acted properly in admitting the challenged evidence and correctly decided the other issues raised. We affirm the convictions.

I.

Defendants have objected to the introduction of evidence seized by the government's informant, Diana Hall, as well as the evidence obtained from the FBI's use of electronic surveillance of defendant Lambert's home and its later physical search of his home and vacation cabin. Our discussion of the facts of this case will therefore, be limited to these particular matters.

In December 1982, defendant Lambert hired Diana Hall to

be his housekeeper. Hall claims that Lambert and his friends openly used illegal drugs in the house. Beginning in May 1982, Hall approached the Federal Bureau of Investigation (FBI) and provided information about Lambert's drug activities. Hall concedes that the FBI paid her some expense money but she insists that her decision to go to the FBI was not motivated by money. Rather, she claims that she acted because of her concerns about the negative effects of drug use, particularly on young people, and her worry about Lambert's health. Over the course of the following year, Hall contacted the FBI approximately 25 times concerning Lambert's activities.

During several of her meetings with the FBI, Hall brought items which she had taken from the Lambert home. These items included test tubes, pills and other drug paraphernalia, as well as check stubs and phone bills which Hall thought might be related to Lambert's drug transactions. She insisted that these items had been discarded or abandoned by Lambert and that she had picked them up while performing her housekeeping duties.

Hall emphasized that the FBI never asked her to retrieve any items from Lambert's house or even suggested that this would be helpful to them. Agent Bill Welsh confirmed this during his testimony before the court. In fact, Hall and Welsh both testified that, after she had expressed a desire to search Lambert's closed safe and his garage, the FBI agents specifically told her *not* to do so.

In November 1982, defendant Block visited Lambert at his home and stayed for a few days in a basement bedroom. During that time, several other persons visited the home and a meeting took place in the basement. Hall, who was working upstairs, smelled chemical odors coming from the basement. She believed that the odors were caused by cocaine being cut or purified. The next day, as she was cleaning the basement, Hall went into a closet and discovered a small football-sized object. Next to it was a thermos. The thermos contained a white powder.

Suspecting cocaine, Hall brought a sample from the thermos to the FBI. She emphasized that the FBI had not asked her to search for drugs or to bring this item to its office. The FBI analyzed the powder in its crime lab and determined that it was indeed cocaine.

Beginning on January 5, 1983, the U.S. Attorney made several applications to U.S. District Judge Moynahan for permission to wiretap Lambert's house. Each application contained extensive information detailing Lambert's drug related activities. The applications also stated that normal investigative procedures could not be used and that, as a result, the wiretaps were necessary. Each application was for a 30 days period. The applications were approved by Assistant Attorney General of the United States D. Lowell Jensen. Judge Moynahan read the applications and then issued orders authorizing the wiretaps. On January 7, 1983, the U.S. Attorney's Office requested the court to amend its January 5th order so as to permit Diana Hall (identified as "a confidential source" or "CS-1") to install and then remove the listening devices. This amended request was signed by an assistant U.S.Attorney but not by Assistant Attorney General Jensen. After the court approved the request, Diana Hall let several FBI agents into Lambert's house so that they could install the wiretaps. Wiretaps were placed in the basement, living room and bedroom.

The initial wiretap application was, as noted above, for a 30 day period. At the conclusion of the 30 days, the U.S. Attorney's Office applied for a 30 day extension. In the application for extension, the U.S. Attorney presented the court with more information concerning Lambert's suspected involvement with illegal drugs. The U.S. Attorney submitted an affidavit from FBI Agent Welsh which explained the Bureau's reasons for wishing to continue the wiretaps. According to Welsh, the information gathered from the initial wiretaps indicated that Lambert was probably discussing drug activities but the FBI was not completely sure because Lambert and his friends

frequently used code words and double talk or simply whispered in low voices when allegedly conversing about drugs. The FBI believed, Welsh stated, that a continuation of the wiretaps would permit it to make a more definite assessment of whether drug-related activities were, in fact, taking place. The U.S. Attorney submitted several transcripts of Lambert's suspicious conversations for the court's inspection. Again, the U.S. Attorney asserted that normal investigative techniques could not be used. The reason for this it was explained, was because Lambert was a very cautious person who would be fearful of revealing any information to strangers, such as undercover FBI agents. His cautiousness had recently increased, Welsh noted, after he had become aware of an earlier FBI surveillance attempt. The application for extension was authorized by Assistant Attorney General Jensen. After reviewing the application and the supporting documents, the court approved the extension request. Two additional extensions were sought by the U.S. Attorney with Jensen's authorization. The court agreed to both extensions after examining several of the wiretap transcripts. On April 30, 1983, the FBI terminated the wiretaps.

On May 4, 1983, Judge Moynahan ordered that the recordings be sealed and placed in the custody of the FBI's Louisville office. He further directed that the recordings be protected from the possibility of tampering or alteration and that their contents

not be disclosed except pursuant to court order. This order was signed and then placed under seal.[1] The recordings themselves were delivered to the FBI's Lexington office, picked up at that office by Agent Joann Moxley and brought by her to the Louisville office. Moxley indicated that she marked each tape and kept an inventory of them. The tapes were stored in cartons and placed in a locked vault. Moxley testified that she maintained a log which showed the name of each person who entered the vault and how long they were inside. According to her log and her own recollection, the tapes remained in the vault and were never checked out by anyone.

Based on the information supplied by Hall, the wiretaps and other information obtained through the FBI's own investigation, the U.S. Attorney applied for a warrant, on April 19, 1983, to search Lambert's house and his vacation cabin. The application requested permission to search these sites for illegal drugs, equipment used to manufacture the drugs and documents relating to the sale and/or distribution of the drugs. An extensive affidavit was submitted in support of the application which detailed the information cited above as well as the FBI's own surveillance showing Lambert's frequent contacts and phone calls with suspected drug dealers. The applicaton was approved by U.S. Magistrate Cook.

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[1]. The district court's order was not originally included in the appellate record. On March 8, 1985, the government moved to supplement the record by including this order. An affidavit from FBI Agent Welsh was submitted in support of the government's motion. In his affidavit, Welsh stated that he was present when the proposed order was given to the court for its consideration. According to Welsh's recollection, the court adopted the proposed order and placed in under seal. Welsh further explained that no copies were made of the order and that, consequently, a copy was not included in the appellate record. Appellant Lambert filed a response in opposition to the government's motion on March 14, 1985. The Circuit Clerk then ordered, on March 20, 1985, that the government's motion be referred to this panel. Pursuant to our authority under Fed.R.App.P. 10(e), we will grant the government's motion.

The FBI searched both houses on April 21,1983. A tremendous quantity of materials was confiscated. The FBI conceded that is seizure was perhaps more extensive than the warrant would appear to have authorized abut explained that the seemingly unauthorized items were seized because its trained dogs had sniffed these items and indicated that drugs were present. Because of the dogs' reaction, the FBI explained, it confiscated these items in order to examine them in the crime lab to see if, in fact, they contained illegal drugs.

Defendants Lambert and Block were indicted on January 19, 1984. The indictment charged Lambert with: (1) conspiracy to distribute cocaine, methaqualone and marijuana in contravention of 21 U.S.C. 846; (2) distribution of cocaine in contravention of 21 U.S.C. 841; and (3) distribution of illegal drugs to a minor in contravention of 21 U.S.C. 845. Block was charged with violations of 841 and 846.

Various motions were filed by the defendants to suppress the evidence. The court rejected these motions. With regard to the extensive amount of arguably unauthorized evidence seized by the FBI during its search of Lambert's house, the court critized the behavior of the FBI but decided against excluding the clearly authorized evidence. The court also ruled that Block lacked the requisite standing to object to the admission of the evidence.

After the court's rulings admitting the evidence, the defendants entered into an agreement with the government to plead guilty to one count of the indictment involving the distribution of controlled substances while reserving their right to appeal the court's evidentiary rulings. The court approved the agreements in June 1984. On July 17, 1984, the court sentenced both defendants to five years imprisonment. On that same day, the defendants filed their appeals.

II.

[1] The district court's evidentiary rulings must be upheld on appeal unless they are clearly erroneous. *United States v. Coleman*, 628 F.2d 961, 963 (6th Cir. 1980). In reviewing the court's rulings under this standard, our inquiry is limited to determining whether the rulings are supported by substantial evidence.

A.

[2] The defendants insist that the items taken by Diana Hall from Lambert's house and delivered to the FBI viloated their Fourth Amendment rights and should, therefore, have been suppressed. Initially, we note that the Fourth Amendment proscribes only governmental action and does not apply to a search or seizure, even an unreasonable one, conducted by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official. *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984); *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 2048, 29 L.Ed.2d 564 (1971). We must, therefore, determine whether Diana Hall was acting as an agent for the government when she took the inculpatory evidence from the Lambert residence.

[3,4] A person will not be acting as a police agent merely because there was some antecedent contact between that person and the police. *United States v. Coleman*, 628 F.2d at 965. Rather, two facts must be shown. First, the police must have instigated, encouraged or participated in the search. *Id.* Second, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts. *United States v. Howard*, 752 F.2d220, 227 (6th Cir. 1985). While it is clear that Diana Hall acted with the requisite agent intent, the record fails to show that the FBI instigated, encouraged or participated in her searches. Both Hall and FBI Agent Welsh expressly testified that the FBI never instructed or encouraged Hall to take

items from Lambert's home. In fact, the record shows that she was told on several occasions that she should not take items from the house. Under these circumstances, Hall's search must be deemed to be a private search and, therefore, not within the purview of the Fourth Amendment.

[5] Diana Hall's search and seizure is not brought within the scope of the Fourth Amendment simply because she brought the seized items to the FBI. As this court has previously held, "there is no seizure within the meaning of the Fourth Amendment when an object discovered in a private search is voluntarily relinquished to the government." *United States v. Coleman*, 628 F.2d at 966. Accordingly, we conclude that the district court did not err in admitting these items.[2]

B.

The defendants contend that the information gathered from the FBI wiretaps should have been suppressed because the wiretaps were illegal. Specifically, they allege that the FBIand the U.S. Attorney failed to comply with several of the statutory requirements for the application and issuance of wiretaps contained in 18 U.S.C. 2516 and 2518. First, they claim that the January 7, 1983 wiretap application was not properly authorized under 2516 because Assistant Attorney General Jensen did not sign it. Even those applications which Jensen did sign were not properly authorized, the defendants maintain, because Jensen, himself, had never received the requisite authorization mandated by the statute. Second, the defendants argue that the applications did not contain the necessary findings required under 2516 and 2518, including that other investigative

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[2]. Given our conclusion that Diana Hall's actions were outside the scope of the Fourth Amendment, it is unnecessary for us to address defendant Block's contention that the court erred in ruling that he lacked the requisite standing to challenge the lawfulness of Hall's search and seizure.

methods could not reasonably have been used. Third, the need for the wiretaps was not sufficiently shown, defendants insist. Fourth, defendants allege that the FBI improperly failed to inform Judge Moynahan of precisely which rooms in Lambert's house it intended to place the listening devices. Finally, the government failed to comply with the sealing and custody requirements of 2518(8)(a), the defendants contend.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, has established a comprehensive scheme for the regulation of government electronic surveillance, prohibiting all secret interception of communications except as authorized by the courts in response to applications from law enforcement officials. *Dalia v. United States*, 441 U.S. 238, 249, 99 S.Ct. 1682, 1689, 60 L.Ed.2d 177 (1979). Section 2516[3] provides that a wiretap application must be authorized by the Attorney General or by a specially designated Assistant Attorney General. On January 19, 1981, then Attorney General Benjamin Civiletti executed Order No. 931-81 designating, among others, the Assistant Attorney General in charge of the Criminal Division to authorize wiretaps in his absence. Soon after taking office, the new Attorney General, William French Smith, executed Order No. 934-81 which provided that, until a new Assistant Attorney General for the Criminal Division was appointed, the Assistant General for the Office for Improvement in the Administration of Justice would be specially designated to authorize wiretaps. Attorney General Smith's order declared that Civiletti's prior order remained in effect. Thus, when the new Assistant Attorney General for the Criminal Division took office, he was implicitly empowered, by virtue of the two orders, to authorize applications for wiretaps.

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3. 18 U.S.C. 2516(1) states, in relevant part:

The Attorney General . . . or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal Judge of competent jurisdiction for . . . an order authorizing . . . the interception of wire or oral communications by the Federal Bureau of investigation . . . .

[6] The statute does not require, nor did the above-cited orders provide, for the designation of a specific individual to authorize wiretaps. Rather, it is permissible for the Attorney General to designate a person by the office he or she holds. This designation will then apply to whomever holds this office in the future. *United States v. Votteller*, 544 F.2d 1355, 1858-9 (6th Cir. 1976). When Lowell Jensen was appointed Assistant Attorney General for the Criminal Division, he was vested with the power to authorize wiretaps by virtue of the office he held. We therefore reject defendants' assertion that Jensen lacked the requisite authority to authorize the wiretaps in this case. *Accord: United States v. Camp*, 723 F.2d 741, 744 (9th Cir. 1984); *United States v. Terry*, 702 F.2d 299, 311 (2d Cir.), *cert. denied*, 461 U.S. 931,103 S.Ct. 2095, 77 L.Ed 304 (1983); *United States v. Robinson*, 698 F.2d 448, 452 (D.C. Cir.1983); *United States v. Wyder*, 674 F.2d 224, 226-7 (4th Cir.), *cert. denied sub nom. Mallory v. United States*, 457 U.S. 1125, 102 S.CT. 2944, 73 L.Ed. 2d 1340 (1982).

[7] While it is true that the January 7th application was not authorized by Assistant Attorney General Jensen, his authorization was not necessary in this instance. Section 2516(1) only requires this authorization on an application for "an order authorizing or approving interception of . . . communications. . . ." The January 7th application did not seek permission to intercept communications. It merely sought the court's permission to change the parties involved in installing the wiretaps. Our conclusion that the Assistant Attorney General's authorization is unnecessary is consistent with the purpose underlying 2516 (1). The requirement that a specially designated senior Justice Department official authorize wiretap applications "was designed to insure that *decisions to wiretap* were made by the named officials and did not reach into the lower echelons of command." *United States v. Cox*, 462 F.2d 1293, 1300 (8th Cir.1972), *cert. denied*, 417 U.S. 918, 94 S.Ct. 2623, 41 L.Ed.2d 223 (1974) (emphasis added). *See also United States v.*

Giordano, 416 U.S. 505, 515, 94 S.Ct. 1820, 1826, 40 L.Ed. 2d 341 (1974) ("The Act plainly calls for the prior, informed judgment of enforcement officers desiring court approval *for interrept authority*, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The mature judgment of a particular, responsible Department official is interposed as a critical precondition to any judicial order." [emphasis added]). This purpose was satisfied by Assistant Attorney General Jensen's authorization of the actual wiretap application. It is not necessary or practical that he be required to approve of the particular means by which the wiretap will be installed. *See Dalia v. United States*, 441 U.S. at 1693.

[8] Defendants further contend that the necessary findings required by 2516 and 2518 were not made. Specifically, they allege that the government failed to show that normal investigative procedures had been tried and proved unsuccessful. An application for a wiretap order must include "a full and complete statement as to whether other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(1)(c). Based upon this application, the court may grant the order if it determines that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(3)(c). These provisions do not require that the police officials exhaust every conceivable non-wiretap investigative technique. All that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate. *United States v. Alonso*, 740 F.2d 862, 868 (11th Cir.1984); *United States v. Webster*, 734 F.2d 1048, 1055(5th Cir. 1984). We must, therefore, determine whether the law enforcement officials and Judge Moynahan satisfied their respective obligations.

[9, 10] The requirements of 2518(1)(c) and (3)(c) were satisfied in the instant case, we conclude. The affidavits in support of the wiretap application explained in great detail that other investigative measures could not reasonably be used because of Lambert's extreme (and correct) suspicion that his activities were being monitored and the fact that alternative investigative procedures, such as directly questioning Lambert and his associates, would likely alert the subjects to the presence and scope of the investigation. This was sufficient to satisfy the government's obligation under 2518(1)(c). *See United States v. Woods*, 544 F.2d 242, 257 and n. 11 (6th Cir. 1976); *United States v. Brown*, 761 F.2d 1272, 1276 (9th Cir. 1985); *United States v. Wilkinson*, 754 F.2d 1427, 1433-4 (2d Cir.1985). The court took specific notice of the affidavit's explanation in its orders authorizing the wiretapes. This was sufficient to satisfy the court's duty under 2518(3)(c).

[11, 12] Defendants also insist that the U.S. Attorney was required to disclose to the court the fact that it intended to place a listening device in Lambert's bedroom. We disagree. The wiretap application was required to include "a particular description of the . . . location of the place where the communication is to be intercepted." 18 U.S.C. 2518(1)(b)(ii). The application complied with this requirement by identifying the location of the Lambert house. The statute does not require the judge to approve the precise location in the house where each listening device will be placed. This is best left to the discretion of the law enforcement officials. [4]

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[4]. As Judge Moore wisely explained:

Judges [should not] be presumed to have such familiarity with the . . . premises in which [listening devices] are to be installed that a court should be required in its order to specify . . . the appropriate location of the bug . . . . Were this to be required, a judge, in consultation with law enforcement officers, might have to visit the premises to be entered and discuss . . . the areas for installations. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field.

United States v. Scafidi, 564 F.2d 633, 640 (2d Cir.1977), *cert. denied*, 436 U.S. 903, 98 S.Ct. 2231, 56 L.Ed.2d 401 (1978).

[13] Next, defendants raise the argument that the U.S. Attorney failed to present evidence of the likelihood that one of the crimes listed in 2516 was occurring at the Lambert residence. This argument is completely without merit. The statute permits the use of a wiretap to uncover evidence of "any offense involving . . . the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marijuana, or other dangerous drugs . . .", 18 U.S.C. 2516(1)(e), or "any conspiracy to commit any of the foregoing offenses," 18 U.S.C. 2516 (1)(h). The U.S. Attorney's applications contained an overwhelming amount of evidence detailing the extensive drug activities at Lambert's house. The evidence offered was more than sufficient to satisfy 2516.

Finally, we reject defendants' assertion that the sealing and custody requirements of 2516(8)(a) [5] were not complied with. In essence, this subsection provides that the tape recordings from the wiretaps shall be made available to the judge, sealed under his directions and placed in the custody of whomever and wherever the court directs. The central purpose of these requirements, as the statue declares, is to "protect the recording from editing or other alterations." Judge Moynahan's May 4, 1983 order complied with these requirements in all respects. Further, the extensive safety precautions taken by FBI Agent Moxley, such as maintaining an inventory of the tapes and writing down the names of all persons who entered the vault where the tapes were stored, provided an additional safeguard that the tapes would not be edited or altered by anyone.

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[5]. 18 U.S.C. 2518(8)(a) provides, in pertinent part:

The recording of the contents of any wire or oral communication . . . shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders . . . .

In summation, we find no merit in defendants' charge that the requirements of 2516 and 2518 were not satisfied. The district court, therefore, properly overruled defendants' motions to exclude the wiretap evidence and the fruits of that evidence.

C.

The defendants contend that the search of Lambert's home and vacation cabin was illegal because the affidavit in support of the search warrant failed to establish probable cause. We disagree.

[14, 15] In determining whether an affidavit establishes probable cause, the court must evaluate the affidavit under a "totality of the circumstances" standard:

The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. [citation omitted].

Illinois v. *Gates*, 462 U.S. 213, 238-9, 103 S.Ct. 2317, 2332-3, 76 L.Ed.2d 527 (1983). Notwithstanding the deference which must be accorded to the magistrate's determination, however, if the information contained in the affidavit simply does not add up to probable cause, the warrant will be held invalid. *United States* v. *Savoca*, 761F.2d 292, 296 (6th Cir 1985).

[16] In the instant case, the government's affidavit in support of the search warrant contained ample factual allegations to establish probable cause. Most significantly, the affidavit detailed Diana Hall's eyewitness account of Lambert's extensive use of illegal drugs at his home and his meetings with persons who appeared to be drug dealers. The affidavit also mentioned the

drugs and drug paraphernalia taken by Hall from Lambert's house and delivered to the FBI. The wiretap evidence indicated that Lambert was using and purchasing cocaine and was likely involved in drug dealing. These allegations were sufficient to establish probable cause to justify the search of Lambert's home. With regard to Lambert's cabin, the affidavit contained wiretap transcripts showing Lambert was in the process of moving his possessions including his drugs, to the cabin. Diana Hall confirmed these moving plans by her own observation and from talking to several of Lambert's friends, the affidavit revealed. When viewed in conjunction with the evidence detailing the drug activities at his home, this evidence was sufficient to show that the probable cause extended to Lambert's cabin as well. We therefore conclude that the magistrate had a substantial basis for his probable cause findings and that the search warrants were properly issued.

Defendants contend that the FBI ignored the limitations contained in the warrant by seizing a substantial quantity of evidence which was outside the scope of the warrant. Given the FBI's "flagrant" disregard of the warrant, defendants argue, the district court should have suppressed all the evidence taken, including that which was admittedly within the scope of the warrant. Again, we find no merit to their contention.

[17] The warrant authorized the FBI to search for illegal drugs, equipment used to manufacture the drugs, drug paraphernalia and all documents relating to the sale and distribution of the drugs. Admittedly, many of the items taken were not, on their face, the specific types of items authorized to be seized by the warrant. However, the FBI dogs trained to sniff for drugs indicated that drug residue was contained on these items. It was impractical for the FBI to remove such microscopic residue without also taking the items themselves. Thus, all of the

items taken by the FBI were within the scope of the warrant, either because of the item itself or because of the drug residue contained on the item.

[18-20] Even if, *arguendo*, these items were not covered by the warrant, suppression of all the items seized would not be mandated. Unlawful seizure of items outside a warrant does not alone render the whole search invalid and require suppression of all evidence seized, including that lawfully taken pursuant to the warrant. *Marvin v. United States*, 732 F.2d 669, 674 (8th Cir.1984); *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982). A flagrant disregard for the limitations of a search warrant might make an otherwise valid search an impermissible general search requiring the suppression of all evidence requiring the suppression of all evidence seized during the search. *Marvin v. United States*, 732 F.2d at 674-5; *United States v. Huagneux*, 683 F.2d 1343, 1354 (11th Cir. 1982), *cert. denied*, _____ U.S. _____, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983); *United States v. Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982). Absent flagrant action, however, the items covered by the warrant will be admissible. *See Waller v. Georgia*, _____ U.S. _____, 104 S.Ct. 2210, 2214 n. 3, 81 L.Ed.2d 31 (1984); *United States v. Huagneus, supra*. In the instant case, the FBI agents made a good faith effort to stay within the scope of the warrant. It was not unreasonable for them to rely on the indications made by their trained dogs that the items contained drug residue. Therefore, even if the agents did exceed the scope of the warrant, it was not error for the court to admit the evidence which was clearly within the warrant's scope.

III.

In conclusion, we find no reversible error in the arguments raised by the defendants. The judgments of conviction are affirmed.

Eastern District of Kentucky
FILED
May 25, 1984
OB 117
At Lexington
Lexie G. Whitmer
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CRIMINAL ACTION NO. 84-4-S

UNTIED STATES OF AMERICA

VS. MEMORANDUM OPINION AND ORDER

JAMES PURDY LAMBERT
and PHILLIP M. BLOCK DEFENDANTS

★ ★ ★ ★ ★ ★ ★ ★ ★ ★

This action is now before the Court on the motion of defendant Lambert to suppress certain tape recordings, documents, and other evidence. Defendant Lambert seeks to suppress evidence gathered through several weeks of electronic surveillance of his cabin on the Kentucky River and his residence in Lexington, Kentucky, and through the subsequent searches of those two locations. This motion has been extensively briefed and argued before this Court.

First, defendant Lambert asserts that all evidence derived from the electronic eavesdropping should be suppressed because this surveillance was improperly authorized. Under 18 U.S.C. 2516, an Assistant United States Attorney must receive prior authorization from the U.S. Attorney General or his specifically designated assistant before making an application for an electronic surveillance order. Defendant's first argument is that the individual who signed the authorization forms in this case

was not properly designated to do so.

In this case, the U.S. made four applications to U.S. District Judge Bernard T. Moynahan, Jr., requesting permission to intercept oral communications. Each application was signed by D. Lowell Jensen, Assistant Attorney General for the Criminal Division.

The record shows that Mr. Jensen was indeed properly authorized by the Attorney General to approve such applications. On the last day of the Carter Administration, then Attorney General Benjamin R. Civiletti signed order no. 931-81, which designated by title the Assistant Attorney General in charge of the Criminal Division to authorize such applications. The following day, January 20, 1981, the new Attorney General, William French Smith, issued designation order no. 934-81, which stated that order no. 931-81 would remain in effect. By so doing, Attorney General Smith reaffirmed that the Assistant Attorney General for the Criminal Division would be authorized to exercise the power conferred by 18 U.S.C. 2516. At that time, this position was vacant.

Defendant's argument is that this order is faulty because it designated an "empty chair" rather than a specific individual to authorize electronic bugging applications. It is however, the law of this circuit that the Attorney General need not name a specific individual to exercise the 2516 authority but may instead designate the individual merely by job title. *U.S. V. Votteller*, 544 F.2d1355 (6th Cir. 1976). Defendants argue that *Votteller* is distinguishable since in that case the position was occupied at the time of the designation and at all relevant later times by the same individual. Defendant apparently suggests that even a designation by job title must, by implication, refer to a specific individual, and that the designation lasts only so long as that person continues to occupy the named office.

The Court finds that defendant's interpretation of 18 U.S.C. 2516 is unreasonable and must be rejected. Requiring the Attorney General to designate a specific individual by name

rather than a position would place an unreasonable burden on the ability of the United States to seek approval of electronic surveillance. The Court finds that under the orders of the Attorney General, referred to above, the Assistant Attorney General, whoever he or she might then be, could validly authorize an Assistant United States Attorney to seek court approval of electronic surveillance. It follows that proper authorization was obtained for each of the applications at issue in this case.

Next, defendant Lambert contends that the orders of Judge Moynahan authorizing the electronic surveillance were defective in that they failed to contain the required findings. Under 18 U.S.C. 2518(3), the authorizing court must find that:

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in 2516 of this Chapter;
>
> • • • •
>
> (c) normal investigative procedures have been tried and and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

As to the finding required by 2518(3)(c), paragraph (c) of the January 5, 1983, order recites that "normal investigative procedures either have been tried and have failed and reasonably appear unlikely to succeed if continued or reasonably appear unlikely to succeed if tried." Defendant objects that these findings are internally inconsistent and contradictory. However, it is clear from a perusal of the affidavits upon which these findings are based that this is not the case. Certain investigative procedures had indeed been tried without success, while other possible techniques would be unlikely to succeed if tried, according to the affiant,F.B.I. agent William Welsh. The findings in the order fully meet the requirements of 2518(3)(c).

Defendant Lambert also objects that the Court failed to

make a proper finding with respect to an offense enumerated in 18 U.S.C. 2516, as required by 2518(3)(a). The order refers to "offenses involving illegal distribution and possession with the intent to distribute controlled substances." 2516(1) (e) refers only to offenses relating to "narcotic drugs, marijuana, or other dangerous drugs." The Court finds that, although the order does not track the exact language of the statute, it makes the required finding with sufficient specificity. Defendant's objections to the findings made in the order authorizing the surveillance are without merit and must be rejected.

Next, defendant argues that the tape recordings must be suppressed because the U.S. failed to comply with the sealing and custody requirements set forth in 18 U.S.C.2518(8). At the May 8, 1984, hearing, the F.B.I.'s custodian of the tapes, Joanne Moxley, testified regarding the sealing and custody of the tapes. Her testimony resolved most of the questions raised by defendant. However, defendant still objects because Ms. Moxley was never appointed custodian of the tapes by special order of Court. The Court finds no such requirement in the statute and must, therefore, reject this objection. Defendant also complains that the tapes were not kept in locked metal file cabinets or other metal containers. Ms. Moxley's testimony showed, however, that the tapes were kept in a locked steel evidence vault. Logs were kept of all persons entering and leaving the vault. This arrangement was even more secure than required by the statute, as interpreted in *U.S. v. Abraham*, 541 F.2d624(6th Cir. 1976). The Court finds that the United States fully complied with sealing and custody requirements of the statute.

Finally, defendant Lambert contends that the recordings must be suppressed due to the unreasonable manner in which the surveillance was conducted. His principal argument is that the U.S. never informed the authorizing judge that the listening devices were to be placed in bedrooms or that intimate bedroom conversations and activities were being monitored. The Court

finds, however, that the United States need not seek such special and separate authorization in order to plant listening devices in bedrooms. Once the F.B.I. has proper authorization to conduct electronic surveillance, the decision as to the placement of the listening devices must, of necessity, be left to its discretion.

The privacy rights of a suspect under electronic surveillance cannot, however, be ignored. 18 U.S.C. 2518(5) requires that such surveillance be conducted so as to minimize the interception of conversatons not pertinent to the investigation. In chambers, the Court has reviewed tape 5C-22, selected by counsel for defendant Lambert as an egregious example of the government's interception of intimate activities. Based on this review, the Court finds that the agents conducting the surveillance made a reasonable effort to minimize the recording of conversations and activities irrelevant to their investigation.

In summary, the Court finds that the grounds advanced by defendant Lambert in support of his motion to suppress the tape recordings produced through electronic surveillance of his residence and cabin are without merit. Therefore, his motion must be denied in this respect.

Defendant Lambert also argues that the evidence seized in the searches of his house and cabin must be suppressed because the affidavits fail to show probable cause to believe that drugs, firearms, and documents related to drug distribution would be found on the premises. The Court has reviewed the affidavits in question, bearing in mind that it must pay due deference to the conclusions of the neutral Magistrate and that it should avoid interpreting the affidavits in a hypertechnical rather than a common-senese manner. *U.S. v. Ventresca*, 380 U.S. 102, 109 (1965). Based on this independent review, the Court finds that the affidavits contain a showing of probable cause more than adequate to support the issuance of search warrants for the described materials.

Defendant Lambert further asserts that even if the warrants

were valid, the manner of their execution was unreasonable because the searches were televised by a local television station and because a great number of irrelevant documents were taken in the search. There was no evidence that the United States was responsible for the presence of the camera crews at the scene of the search. In any case, defendant cites no authority that the search would be invalid even if the government had arranged for the media to be present when the search warrant was executed.

However, the Court finds that the complaints of defendant are well taken regarding the volume of irrelevant documents and other material seized. The warrant authorized the seizure only of documents relating to the sale and distribution of controlled substances. Nevertheless, the government agents proceeded to seize such clearly irrelevant documents as the third grade report card of defendant's son, an invoice for an oil change, an invitation to an Elmhurst Farm luncheon, a fund raising letter for the Albert B. Chandler Medical Center, a 1975 offer to purchase defendant's house, and other papers which were clearly outside the scope of the search warrant. The F.B.I. then took these materials, along with a large quantity of defendant's business and financial records, to their headquarters in Louisville, where they have been held for the past year. The fact that the prosecution has announced its intention to introduce only five of the documents at trial evidences the unreasonableness of the search. Although this behavior was unreasonable and is strongly condemned by the Court, it does not appear to provide justification for suppressing those materials which were validly seized under the authorization of the search warrant. For this reason, the motion of defendant to suppress *all* evidence seized in the search must be denied. However, those documents which do not prove to relate to the distribution and sale of controlled substances will be suppressed, if necessary, at trial.

Finally, defendant Lambert moves to suppress all evidence obtained through seizures by a confidential source,designated

by the government as CS-1, on grounds that the source must be considered an agent of the government whose search and seizure activities are subject to the constraints of the Fourth Amendment. In order to determine the extent of the government's involvement with and control of CS-1, defendant seeks to have CS-1 made available for questioning under oath. Since the United States represents that the informant will testify at trial, the defense will have the opportunity to examine CS-1 upon voir dire. In the meantime, the motion to suppress all evidence derived from the informant's seizures must be denied.

IT IS NOW THEREFORE ORDERED HEREIN that the motion of defendant Lambert to suppress certain evidence be, and herewith is, GRANTED as to those documents which do not relate to the sale and distribution of controlled substances, but in all other respects is DENIED.

This the 25th day of May 1984.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Eastern District of Kentucky
FILED
June 6, 1984
OB 117
At Lexington
Leslie G. Whitmer
Clerk, U.S. District Court

CRIMINAL ACTION NO. 84-4-S

UNITED STATES OF AMERICA PLAINTIFF

VS. *MEMORANDUM OPINION AND ORDER*

JAMES PURDY LAMBERT
and PHILLIP M. BLOCK DEFENDANTS

★ ★ ★ ★ ★ ★ ★ ★

This action is now before the Court on the motion of defendant Lambert to suppress all evidence derived from searches and seizures by the government's confidential informant, now identified as Diana Hall. Ms. Hall, who was formerly Mr. Lambert's housekeeper, testified at a hearing held June 4, 1984, concerning her duties as an employee of Mr. Lambert and the events which led her to furnish certain items and information to agents of the Federal Bureau of Investigation.

Defendant Lambert contends that the activities of Ms. Hall viloated his rights under the Fourth Amendment to the U.S. CONSTITUTION. It has long been established that, as a general rule, the Fourth Amendment applies only to governmental action, and places no limits on searches and seizures, even unreasonable ones, conducted by a private individual not acting as an agent of the government. *U.S. v. Coleman*, 628 F. 2d 169 (6th Cir. 1980); *U.S. v. Rodriguez*, 596 F.2d 169 (6th Cir. 1979). The first question is whether, in light of all the circumstances, Ms. Hall should be regarded as an agent of the government whose search and seizure activities are subject to the constraints of the Fourth Amendment, including the

warrant requirement and exclusionary rule. In deciding whether the actions of a private party should be attributed to the government for purposes of the Fourth Amendment, courts focus on the motive of the private party and the involvement of government agents in carrying out the search and seizure activities. *See, e.g., U.S. v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982).

At the hearing, Ms. Hall testified without contradiction that she became an informant not out of expectation of financial reward but out of concern for the health and safety of Mr. Lambert and his associates. Ms. Hall and F.B.I. Agent William Welsh further testified that, although agents of the F.B.I. accepted items proferred by Ms. Hall, they never instructed or encouraged her to take evidence from Mr. Lambert's home. According to Ms. Hall, they repeatedly told her that they wanted information, not evidence. Based on the testimony of Ms. Hall and Agent Welsh, the court finds that Ms. Hall was acting solely in a private capacity and not as an agent of the government in furnishing the items in question to the F.B.I.

Furthermore, even if Ms. Hall were properly regarded as a government agent, her seizure comes within at least two exceptions to the warrant requirement of the Fourth Amendment. Many of the items taken, such as empty containers and broken laboratory equipment, were discarded trash. Defendant Lambert can have no Fourth Amendment privacy interest in items which are abandoned as trash. *Magda v. Benson*, 536 F.2d 111 (6th Cir. 1976). Other items, such as the cocaine seized from the open thermos and pills left on coffee tables and counters, were obviously incriminating items which were in plain view. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). As Mr. Lambert's housekeeper, Ms. Hall had full run of the house. She testified that there was no area which was off limits to her in his residence and that, in fact, Mr. Lambert had offered her cocaine and pills on several occasions. Mr. Lambert mistakenly placed confidence in Ms. Hall when he gave her

free and unlimited access to his house. *Compare Hoffa v. U.S.*, 385 U.S. 293 (1966). Even if she were considered to be a government agent, no privacy interest of Mr. Lambert was violated when she turned over to the F.B.I. items which he had made freely available to her, and which he left in her plain view.

IT IS NOW THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

(1) That the motion of defendant James Purdy Lambert to suppress all evidence derived from the searches and seizures of Diana Hall be, and herewith is, DENIED;

(2) That this action be SET FOR HEARING on June 7, 1984, at 10:00 a.m., in Courtroom B of the United States Courthouse, Lexington, Kentucky.

This the 6th day of June 1984.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

DEFENDANT: JAMES PURDY LAMBERT

Eastern District of Kentucky
Lexington
DOCKET NO: 84-4-S

JUDGMENT AND COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: July 17, 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL James Shuffett & Frank Haddad, Jr. (Name of Counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea. Ct.1 pursuant to Rule 11(a)(2),F.R.Cr.P.

[ ] NOLO CONTENDERE,

[X] NOT GUILTY Cts.2-59;66 & 67

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly and willfully conspiring to knowingly and intentionally distribute and possess with intent to distribute and dispense cocaine, marijuana and methaqualone, Schedule I and II controlled substances, in violation of Title 21, Section 846, United States Code.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

FIVE (5) YEARS pursuant to Title 18, Section 4205(a), United States Code, on Count 1.

SPECIAL CONDITIONS OF PROBATION

A presentence report was submitted to the Court before imposition of sentence and copies of same were made available to defendant and counsel pursuant to Rule 32, F.R.Cr.P.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, counseling for alcohol and substance abuse while incarcerated; and treatment for substance abuse as directed by the United States Probation Office, upon release from incarceration.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer.

Eastern District of Kentucky

JUL 17 1984

AT LEXINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Scott Reed, Judge

Date July 17th, 1984

Appendix to 1:2

FILED
August 16, 1985
JOHN P. HEHMAN, CLERK

United States Court of Appeals
For the Sixth Circuit

No. 84-5660/5661

UNITED STATES OF AMERICA Plaintiff-Appellee

v.

JAMES PURDY LAMBERT (84-5660),
PHILLIP M. BLOCK (84-5661) Defendants-Appellants

Before: KENNEDY and WELLFORD, Circuit Judges; and WEICK, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

No cost taxed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

No. 84-5660/1

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
Sept. 27, 1985
John P. Hehman, Clerk

UNITED STATES OF AMERICA)
Plaintiff-Appellee)
v.) ORDER
)
JAMES PURDY LAMBERT (84-5660))
PHILLIP M. BLOCK (84-5661))
Defendants-Appellants

BEFORE: KENNEDY and WELLFORD, Circuit Judges, and WEICK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NOS. 84-5660/5661

RECEIVED
Aug. 27, 1985
JOHN P. HEHMAN, CLERK

UNITED STATES OF AMERICA — Plaintiff-Appellee

VS.

JAMES PURDY LAMBERT
and PHILLIP M. BLOCK — Defendants-Appellants

Appeal from the United States
District Court for the Eastern
District of Kentucky, No. 84-4-S

PETITION FOR REHEARING
and
SUGGESTION FOR REHEARING EN BANC
for
DEFENDANT-APPELLANT JAMES PURDY LAMBERT

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COUNSEL FOR DEFENDANT-APPELLANT
JAMES PURDY LAMBERT

REQUIRED STATEMENT FOR REHEARING EN BANC

Comes the Defendant-Appellant, James Purdy Lambert, by counsel, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 14 of the Rules of the United States Court of Appeals for the Sixth Circuit, and respectfully petitions the Court to grant a rehearing of his appeal herein and suggests that his appeal be reheard en banc.

The undersigned expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Untied States Court of Appeals for the Sixth Circuit and that consideration of the full Court is necessary to secure and maintain uniformity of decisions in this Court: *United States v. Abraham*, 541 F.2d 624 (6th Cir. 1976), and *United States v. Coleman*, 628 F.2d 961 (6th Cir. 1980).

/s/ James A. Shuffett

JAMES A. SHUFFETT
ATTORNEY OF RECORD FOR
DEFENDANT-APPELLANT,
JAMES PURDY LAMBERT

INTRODUCTION

Defendants-Appellants James Purdy Lambert and Phillip M.Block entered conditional pleas of guilty in the United States District Court, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure to single counts of conspiracy to distribute controlled substances in violation of 21 U.S.C. Section 846 and received sentences of five (5) years imprisonment. In their conditional pleas, they reserved the right to appeal from the District Court's denial of their pretrial motions to suppress evidence obtained by the government through the actions of an F.B.I. informant, electronic surveillance, and search warrants.

On August 16, 1985, a panel of the United States Court of Appeals for the Sixth Circuit affirmed those convictions. A copy of that Opinion is attached to this Petition as an addendum hereto.

REASONS FOR GRANTING A REHEARING

Mr. Lambert urges the Court to grant a rehearing on all issues raised in this appeal. This Petition however, is of necessity confined to the following three issues:

I. Whether the Panel's Opinion was incorrect when it found, at Page 8, that "While it is clear that Diana Hall acted with the requisite agent intent, the record fails to show that the F.B.I. instigated, encouraged, or participated in her searches."

II. Whether the Panel's decision was incorrect when it granted the government's motion to supplement the appellate record with a sealing and custody order that was not considered by the District Court and has not been seen by defense counsel.

III. Whether the Panel's Opinion was incorrect when it found there was no flagrant disregard for the limitations of the search warrant.

ARGUMENT

I. THE PANEL'S OPINION WAS INCORRECT WHEN IT FOUND, AT PAGE 8, THAT WHILE IT IS CLEAR THAT DIANA HALL ACTED WITH THE REQUISITE AGENT INTENT, THE RECORD FAILS TO SHOW THAT THE F.B.I. INSTIGATED, ENCOURAGED OR PARTICIPATED IN HER SEARCHES."

In reaching the conclusion that the F.B.I. did not "instigate, encourage or participate" in her searches, the opinion failed to consider several very important and undisputed facts:

1. Diana Hall had an F.B.I. informant number (Tr. 6/4/84, p. 22), and had been a *paid* informer for the F.B.I. in two previous cases (Tr. 6/4/84, p. 25).

2. For her services in this case, she admitted to being paid the sum of $2,000 on one occasion (Tr. 6/4/84, pp. 8-9) and claimed that she could not remember the amount of the additional payment a few months later (Tr. 6/13/84, p. 147).

3. She provided information regarding Mr. Lambert to the F.B.I. on at least twenty-five (25) occasions (Tr. 6/4/84, p. 21).

4. She removed items from Mr. Lambert's house on five (5) to ten (10) occasions and gave these items to the F.B.I. (Tr. 6/4/84, p. 20).

5. The F.B.I. constantly directed her as to what she could or could not do to assist them (Tr. 6/4/84, pp. 18-19, 80).

6. Some of the items, removed by Ms. Hall and given to the F.B.I., a check stub and phone bill regarding Mr. Lambert's relationship with then Governor John Y. Brown, Jr., were given to Channel 27 and shown on television (Tr. 5/7/84, p. 16).

How can it be said that a highly paid agent being directed in her actions was not "encouraged" or that her principal (the

F.B.I.) was not "participating" in her activities?

In reaching its conclusion, the Panel relied on *United States v. Coleman*, 628 F.2d 961 (6th Cir. 1980) and *United States v. Howard*, 752 F.2d 220 (6th Cir. 1985). The panel's opinion did not mention *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981).

Mr. Lambert submits that *Walther*, supra, is almost four-square with the case at bar and that it deserves to be considered and followed. *Coleman* and *Howard*, supra, are not in point.

II. THE PANEL'S DECISION WAS INCORRECT WHEN IT GRANTED THE GOVERNMENT'S MOTION TO SUPPLEMENT THE APPELLATE RECORD WITH A SEALING AND CUSTODY ORDER THAT WAS NOT CONSIDERED BY THE DISTRICT COURT AND HAS NOT BEEN SEEN BY DEFENSE COUNSEL.

At Page 5 of its Opinion and footnote 1 thereon, the Panel sustained the government's motion to supplement the appellate record. The new matter now in the record is apparently a sealing and custody order signed by Judge Moynahan on May 4, 1983, which was not introduced at the trial court level and which has not been seen by defense counsel. At pages 13-14 of its Opinion, the Panel then finds that this order complies with the custody and sealing requirements of 18 U.S.C. Section 2518 (8)(a) [sic].

Rule 10(e), Federal Rules of Appellate Procedure, appears to be the only rule providing for supplementation of the appellate record. The rule is designed to supplement the appellate record to accurately reflect what occurred before the trial court. It provides:

(e) Correction or Modification of the Record.

> If any difference arises as to whether the record truly discloses *what occurred in the district court*, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material

> to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals. [Emphasis added].

Rule 10(e) does not appear to be available to supplement the record with evidence not presented to the trial court. *United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1981) is most clearly in point:

> *What in fact went on* below may be settled and placed of record pursuant to Rule 10(e) and whatever proceedings are necessary to that end are permissible. New proceedings of a substantive nature, designed to supply what might have been done but was not, are beyond the reach of the rule. [Emphasis in original].

The May 4, 1983 order of Judge Moynahan was not introduced into evidence or considered by the trial court.

In addition, the Panel's Opinion did not even mention *United States v. Abraham*, 541 F.2d 624 (6th Cir. 1976), which directly sets forth the sealing and custody requirements previously established in the Sixth Circuit. Basic due process fairness would seem to dictate that the government and the defendant each be bound by the same procedural framework.

This issue should be reconsidered and analyzed as done by Mr. Lambert at pp. 37-41 of his original Brief, pursuant to the law of this circuit as set forth in *Abraham*, supra, and also pursuant to *United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976), which is squarely in point.

III. THE PANEL'S OPINION WAS INCORRECT WHEN IT FOUND THERE WAS NO FLAGRANT DISREGARD FOR THE LIMITATIONS OF THE SEARCH WARRANT.

At Page 16 of its Opinion, the Panel acknowledged that a flagrant disregard for the limitations of the search warrant could make an otherwise valid search an impermissible general search requiring the suppression of all evidence seized during the search. However, it appears that the Panel made its own new finding as to the reasonableness of the F.B.I. actions, in effect, overruling the findings of Judge Reed.

The relevant portion of Judge Reed's findings is located at Appendix p. 121, Volume I, of the Joint Appendix herein. Judge Reed found:

> However, the Court finds that the complaints of defendant are well taken regarding the volume of irrelevant documents and other material seized. The warrant authorized the seizure only of documents relating to the sale and distribution of controlled substances. Nevertheless, the government agents proceeded to seize such clearly irrelevant documents as the third grade report card of defendant's son, an invoice for an oil change, an invitation to an Elmhurst Farm luncheon, a fund raising letter for the Albert B. Chandler Medical Center, 1975 offer to purchase defendant's house, and other papers which were clearly outside the scope of the search warrant. The F.B.I. then took these materials, along with a large quantity of defendant's business and financial records, to their headquarters in Louisville, where they have been held for the past year. The fact that the prosecution has announced its intention to introduce only five of the documents at trial evidences the *unreasonableness* of the search. Although this behavior was *unreasonable* and is *strongly condemned* by the Court, it does not appear to provide justification for suppressing

> those materials, which were validly seized under the authorization of the search warrant. For this reason, the motion of defendant to suppress *all* evidence seized in the search must be denied. However, those documents which do not prove to relate to the distribution and sale of controlled substances will be suppressed, if necessary, at trial. [Emphasis added].

Judge Reed's entire opinion is located at Appendix pages 114-122 of Volume I of the Joint Appendix herein. Nowhere in his opinion does he mention the "drug sniffing" dog story relied upon by the Panel at Page 16 of its opinion. Quite possibly the reason Judge Reed did not mention it is because it was contained in an 11th-hour uncross-examined affidavit, which he did not accept -- whatever the circumstances, he made no findings as to the truth, or lack of it, contained therein.

As the Panel's Opinion correctly states at Page 7:

> The district court's evidentiary rulings must be upheld on appeal unless they are clearly erroneous. *United States v. Coleman*, 628 F. 2d 961, 963 (6th Cir. 1980). In reviewing the court's rulings under this standard, our inquiry is limited to determining whether the rulings are supported by substantial evidence.

The facts, as found by Judge Reed are quoted above. They do not include the "drug sniffing" dog material contained on Page 16 of the Panel's Opinion. In addition, the Court should reexamine the inventory of items seized, which is located at Appendix pages 188-196, of Volume I, of the Joint Appendix herein.

Mr. Lambert requests that this matter be reconsidered, and that the facts, as found by Judge Reed, be applied to the law as stated by the Panel's Opinion.

CONCLUSION

Mr. Lambert respectfully requests that his Petition for Rehearing and Suggestion for Rehearing En Banc be granted.

RESPECTFULLY SUBMITTED,

/s/ James A. Shuffett

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COUNSEL FOR DEFENDANT-APPELLANT
JAMES PURDY LAMBERT

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc was served on the United States of America by mailing same first class mail, postage prepaid, to Hon. Robert F. Trevey, Assistant United States Attorney, P.O. Box 1490, Lexington, Kentucky, 40591, and on the defendant-appellant Phillip M. Block by mailing same first class mail, postage prepaid, to his attorney of record, Hon. Donald Waggener, 400 Security Trust Building, Lexington, Kentucky, 40507, all on this the 26th day of August, 1985.

/s/James A. Shuffett

COUNSEL FOR DEFENDANT–APPELLANT,
JAMES PURDY LAMBERT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL NO. 84-4-S

UNITED STATES OF AMERICA PLAINTIFF

VS. INVENTORY OF DOCUMENTS

JAMES PURDY LAMBERT
and PHILLIP M. BLOCK DEFENDANTS

★ ★ ★ ★ ★ ★ ★

Pursuant to the request of Defendant Lambert, a court-suprvised inventory was conducted on May 8, 1984, of all documents produced under subpoena as seized from 805 Old Dobbin Road and the cabin at Route No. 4, Lower Amster Road. The following is a list of those documents:

SMALL BOX:

1) 269-2969 - Original Telephone Bills of James P. Lambert for November 13, 1979 through August 13, 1980.

2) Beverly Hills Hotel Bill for February 17, 1983 through Fegruary 20, 1983 - California.

3) Bill to James P. Lambert from Miller, Griffin & Marks for August 1, 1980 with envelope.

4) December 7, 1979 Letter to James P. Lambert from Robert English with copy of news article with envelope.

5) Statement of Operations, Library Lounge, for January 31, 1982 and October 31, 1981.

6) Accountant work papers, 3 pages, Brown-Lambert for December 31, 1981.

7) Photograph - U.P.I.

8) One sheet of notebook paper with dollar amounts and dates. (No. 6 and initials F.B.I.).

9) Telephone Index (beige metal with sliding alphabetical

indicator) from Master Br. tabletop.

10) Cabin photographs of James Purdy Lambert and various people.

11) Bank of Lexington statement of February 25, 1983 for account No. 64-130-8.

12) Bank of Commerce Statement of Account No. 253-781-8 for February 11, 1983.

13) Brochure of Y.M.C.A. with no writing.

14) Greeting Card "Hello to Tom and Michelle from Donah". Envelope postmarked April, 1983 and addressed to James Purdy Lambert.

15) Small piece of paper - "John Walden, 299-6796".

16) Com-Air Receipt for Sable Tyree for January 3, 1983.

17) Envelope (taped shut) - KET to James P. Lambert on April 18, 1983 - has unknown document inside.

18) A.B. Chandler Medical Center Fund Raising Letter.

19) A.B. Chandler Medical Center Fund Raising Reply Card.

20) Envelope - Y.M.C.A.

21 Statement from florist shop.

22) Estimate from electric company.

23) Ad for an art print.

24) Thank you note from KET.

25) Receipts from Begley's for October 21, 1980 and October 24, 1980.

26) Invitation to Grand Opening of rug shop.

27) Letter from Larry Grouse to James P. Lambert - Announcement for Hollenbach Fund Raiser.

28) Envelope to Hal. Slone c/o James P. Lambert.

29) Invitation to Elmhurst Farm Luncheon.

30) Lambert Business Card.

31) Y.M.C.A. fund raising letter.

32) Envelope to Mr. and Mrs. James P. Lambert, Jr.

33) Envelope to James P. Lambert.

34) Reply envelope to A.B. Chandler Medical Center.

35) Reed Harris Football Newsletter.

36) Photograph - U.P.I.

37) Todd Hollenbach political card with "Todd - 502-896-1635".

38) Pieces of paper with telephone numbers.

39) Envelope - Phelps Lambert to James P. Lambert with 1982 Financial Statement of James P. Lambert.

IN ENVELOPES

40) Bank of Commerce & Trust Co. statements, cancelled checks, etc.

41) First Security National Bank & Trust Co. Statements, cancelled checks, etc.

42) Big Daddy Liquor Financial Statements - December 31, 1981.

43) Library Lounge Statements of Operations - December 31, 1981 and November 31, 1982.

44) Piece of paper with: Megan 273-8752; Simone 272-4727; and Donna 415-821-0335.

45) Directions to Holiday Inn, LaFollette, Tennessee, and note of plane arrival time.

46) Steno notebook (orange) with inventory of fixtures, etc. for **Old Dobbin,** basement, second floor and main floor.

47) **Odds on football teams** on white stationary with **lips** at top. Labeled by U.S. as suspected gambling records found on microwave oven.

FROM LAMBERT RESIDENCE, MASTER BEDROOM NIGHT STAND:

48) Financial records in brown envelope from Trumps, April of 1979.

49) Lease, Texas Steakhouse, University Plaza.

50) Offer to Purchase from William Taylor for Library Lounge and Big Daddy's $200,000.

MANILLA ENVELOPE:

51) Allen House Invoice for furniture to James P. Lambert.

52) Lease for Richmond Mall and BKL, Inc., September 28, 1977.

53) Agreement for Lease Asssignment, signed by William Taylor on March 28, 1977.

54) 1977 Lambert Tax Returns.

55) 1977 Application for tenative refund.

56) Note from Coopers and Lybrand regarding 1977 Tax Return.

57) University Plaza Shopping Center Expense Items, December 31, 1975.

FILE FOLDER MARKED "JPL":

58) Cancelled Checks, Taylor Industries to James P. Lambert, $1,147.80, per check per month, June, 1979 to May, 1980.

59) Chattel Mortgage Security Agreement regarding Big Daddy's with $80,000 Note attached. Two Xerox Copies of same.

60) Lease for Library Lounge.

61) Typed statement of facts regarding University Plaza.

62) Greeting card from "Pete".

63) Lease for Big Daddy's.

MANILLA ENVELOPE, TAYLOR INDUSTRIES TO JAMES P. LAMBERT:

64) 80,000 Note with copy attached to original and copy of Sales Agreement, James P. Lambert to Taylor, 50% of Big Daddy Liquors.

65) Lease on Big Daddy Liquors.

66) Taylor Industries Prospectus regarding Circus Disco.

67) Circus Disco door pass.

68) 80,000 Note with copy attached to original and copy of Sales Agreement, Taylor to James P. Lambert, 50% of Big Daddy's Liquors.

MANILLA ENVELOPE, ALUMINA CERAMICS TO JAMES P. LAMBERT:

69) Chattel Mortgage Security Agreement on Big Daddy Liquors.

70) Taylor to James P. Lambert, Interest in Liquor License.

71) James P. Lambert to Taylor, Interest in Big Daddy Liquors.

72) Amortization Schedule for Note.

73) Handwritten draft of Agreement on Big Daddy Liquors.

74) 80,000 Note, Taylor to James P. Lambert.

75) Handwritten note, Taylor to James P. Lambert regarding lease.

76) Lease, one page from a Lease on Pizza Hut, University Plaza.

MANILLA ENVELOPE, TRUMPS TO JAMES P. LAMBERT:

77) Balance Sheets for June, 1978 and July, 1978.

GREEN GARBAGE BAG:

78) Bank Statements: Bank of Commerce & Trust Co., First Security National Bank & Trust Co., Central Bank, includes cancelled checks.

79) May 31, 1974 receipt from Hilton Inn, Virginia Beach, Virginia, to James P. Lambert.

MANILLA ENVELOPE, COOPERS & LYBRAND TO JAMES P. LAMBERT:

80) 1979 Tax Returns.

MANILLA ENVELOPE, LUM'S TO JAMES P. LAMBERT, HANDWRITTEN ON FRONT LEASE, TRUMPS":

81) Telephone bills, telephone number: 278-6736, at Overbrook Court, June 1975 through 269-2969, at Old Dobbin, May of 1979.

MANILLA ENVELOPE, LUM'S TO LAMBERT, HANDWRITTEN ON FRONT, "PARTNERSHIP AGREEMENT":

82) Casinelli Square, Springdale, Ohio.

83) April, 1975 Partnership Agreement, for Lum's.

84) April, 1975 Limited Partnership Agreement, Library Lounge.

MANILLA ENVELOPE, LUM'S TO JAMES P. LAMBERT, HANDWRITTEN ON FRONT "IN PLACE OF PERFORMANCE BOND":

85) Cover letter with attached Guarnatee, Lambert and Lum's regarding Library Lounge, Springfield, Ohio.

LEGAL SIZE FILE FOLDER, HANDWRITTEN ON FRONT, "JAMES P., WILLIAM CLARK AND PETE":

86) 1976 Financial Statement for James P. Lambert.

87) Casinelli Square Lease and related documents.

MANILLA ENVELOPE JOSEPH G. FEHRING, P.A., COLERAIN, OHIO TO JAMES P. LAMBERT, HANDWRITTEN ON FRONT "HOWARD AND HALL, 278-1960, SOUTHLAWN":

88) Schedule K-1 for James P. Lambert, 1976 regarding Trumps.

BROWN GARBAGE BAG:

89) One empty brown garbage bag.

90) Small piece of paper with "Gordon Bogdan, 1-513-984-0900".

91) Blank counter checks from Farmer's Bank & Trust, Henderson, Kentucky. Has tree missing checks and blank check stubs.

IN RUBBERBANDED BUNDLE:

92) St. Francis School to James P. Lambert, Tommy Lambert's third grade progress report.

93) 1973 Temporary driver's license for James P. Lambert.

94) Small note pad with telephone numbers and grocery list.

95) Small piece of paper with "Jack and Bill, 920-3701, Henshaw".

96) Four paycheck vouchers from Glick Co. to Mary Rose in envelope marked Fairington Apts., Lexington.

97) Envelope from Patrick E. Madden labeled "CASSETTE Index". Contains index of blues songs from tape collection.

98) 1973 Ohio Thoroughbred license for James P. Lambert.

99) Two small pieces of paper with scribbled names. "Phil" and telephone numbers.

100) Letter, Cliff Hagan, University of Kentucky, to James P. Lambert regarding NCAA rules violation by Lambert, dated 1978 with envelope.

101) Library Lounge envelope to James P. Lambert, containing March, 1979 Statement of Operations for Big Daddy Liquors.

102) Account Statement, First Commonwealth Corporation, notice of interest earned to James P. Lambert.

103) Col. Sanders sticker.

104) Taylor Industries envelope to James P. Lambert with documents regarding Big Daddy Liquor, liquor license application for April of 1976.

105) Letter to James P. Lambert from Harry Miller with Petition from neighborhood regarding liquor license.

106) Lambert business card.

107) Yellow note paper with what appears to be point spreads on football games.

108) 1982 Irish Fellowship Club card for John T. Rogers.

109) Small pieces of paper with Mazzoni, 502-895-1717, Wendell Starbuck, 252-5090, Charles Chip, 513-791-4307.

110) Property tax statement on Nag's Head property with note from Pearl Brantley to James P. Lambert with envelope.

111) Checking account reconciliation for James P. Lambert, January of 1978.

112) 1976 First Security National Bank statement with envelope.

113) Letter: Fred Eaton, Venezuela to James P. Lambert with envelope.

114) Yellow Jockey Club napkin with Jason Queen, Harbour House, So. Bal Harbour, Florida.

115) Two copies of December 27, 1971 letter regarding Kentucky Fried Chicken.

116) Air transport baggage label for Sherri McVay, January of 1982.

117) 1972 Venezuelan Kentucky Fried Chicken document.

118) Hand-drawn picture of a tree with telephone numbers, 502-589-2001, 1-800-292, 1552, and Bill Taylor, 276-1212."

119) Piece of manilla envelope with Earl Mazzoni" and telephone number, notation to call John Brown around 11:00, Ollies, 426-5910.

120) Three Lambert business cards for Kentucky Fried Chicken, Venezuela.

121) Envelope, W.E. Hutton to James P. Lambert, handwritten on front: Buy and Sell Confirmation on 10,000 shares of Kentucky Fried Chicken Stock."

122) Bank of Commerce & Trust, Central Bank, First Security Bank & Trust Co. Bank Statements.

123) Envelope, John Wikswo to James P. Lambert on March 10, 1976 with personal letter.

124) Three James P. Lambert business cards.

125) Telephone records, Old Dobbin, 269-2969, August of 1979 to October of 1979.

126) January of 1975 letter to James P. Lambert offering to buy Overbrook Circle house.

127) Invoice for car oil change.

128) Envelope, First Security National Bank to Patricia Lambert of August 31, 1976, sealed closed.

129) Telephone numbers of Jean, 277-2451, Peggy, 276-3683" on pharmaceutical company stationary.

130) Stack of miscellaneous personal records including letters, Visa bill, etc. from 1974 to 1979.

131) Small piece of paper with Carolyn Robertshaw, Morton Street, New York City, 212-675-3909."

MICHAEL D. BAKER
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